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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 332.

FENELON BOESCHE, Administrator of the Estate of F. W. C. Boesche, Deceased,
Appellant,

vs.

STEWART L. UDALL, Secretary of the Interior,
Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF AMICI CURIAE, ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, MID-CONTINENT OIL AND GAS ASSOCIATION AND NEW MEXICO OIL AND GAS ASSOCIATION.

SCOTT A. PFOHL
Chairman, Legal Committee,
Rocky Mountain Oil and Gas Association,
Denver Club Building,
Denver, Colorado,

NORBERT E. PROCTOR,
Chairman, Subcommittee on Public Lands Matters of Legal Committee,
Mid-Continent Oil and Gas Association,
101 University Boulevard,
Denver, Colorado,

HOWARD C. BRATTON,
Chairman, Public Lands Committee,
New Mexico Oil and Gas Association,
Hinkle Building,
Post Office Box 10,
Roswell, New Mexico.

Of Counsel:
A. G. MCCLINTOCK,
304 West 20th Street,
Cheyenne, Wyoming.

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BRIEF OF AMICI CURIAE, ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, MID-CONTINENT OIL AND GAS ASSOCIATION AND NEW MEXICO OIL AND GAS ASSOCIATION.

This brief of *amici curiae* is filed on behalf of the Rocky Mountain Oil and Gas Association by the attorneys indicated as members of its Legal Committee, the Mid-Continent Oil and Gas Association by the Chairman of its Public Lands Committee, and by the New Mexico Oil and Gas Association by the Chairmen of its Legal and Public Lands Committees. The Rocky Mountain Oil and Gas Association, The Mid-Continent Oil and Gas Association, and the New Mexico Oil and Gas Association and the membership thereof consisting, respectively, of about 2,300,

8,500, and 500 oil and gas companies and private individuals are not directly involved in the present litigation, but are vitally concerned with the outcome of this case because it will not only directly affect the practical operation of the Mineral Leasing Act as well as the stability of leasehold titles under Public Domain leases but will also materially affect the economic and property interests of the members of said Associations by reason of their large holdings, as lessees, of Federal Oil and Gas Leases. Because of the extreme importance of the issues involved and because of their large holdings of Public Domain Leases, the said Associations on behalf of their membership, respectfully request permission to file this brief as *amici curiae*. Written consent of all parties to the case has been obtained and filed with the Court.

STATEMENT OF FACTS.

On September 11, 1956, appellant's father filed application for an oil and gas lease (NM 027951) on an 80-acre tract of public land. On that date an adjoining 40-acre tract was under application for lease filed by Thomas Connell. Also on September 11, 1956, but later in the day, Vincent Cuccia and George E. Conley filed a joint application for a lease on both the 80-acre and 40-acre tracts. Thereafter, and in the following order, the Manager of the Santa Fe Land Office (1) issued a lease on the 40-acre parcel to Connell, (2) issued a lease on the 80-acre parcel to Boesche, (3) rejected Cuccia and Conley's application.

Cuccia and Conley appealed from the Manager's decision to the Director of the Bureau of Land Management. By decision of January 9, 1959, the Director reversed the Manager's decision, holding that the Manager erred in issuing the Boesche lease and that the Boesche lease should be cancelled for failure to comply with that portion of

43 CFR 192.42(d) that "No offer [to lease] may be made for less than 640 acres except * * * where the land is surrounded by land not available for leasing under the Act."

Boesche appealed to the Secretary of the Interior, who by decision of August 5, 1959, affirmed the Director's decision and directed cancellation of the Boesche lease.

Appellant filed timely suit in the United States District Court for the District of Columbia and that court by its judgment dated November 23, 1960, upheld the authority of the Secretary to cancel Boesche's lease by administrative action.

The appellant appealed to the United States Court of Appeals for the District of Columbia Circuit. By *per curiam* opinion dated November 16, 1961, the Circuit Court affirmed the decision of the District Court.

Appellant's petition for a Rehearing *en banc* was granted by the District of Columbia Circuit and the November 16, 1961, *per curiam* judgment was vacated and set aside. After the Rehearing the Court *en banc per curiam* order reinstated its November 16, 1961, judgment.

ARGUMENT.

The Secretary of the Interior Has No Authority to Cancel Oil and Gas Leases by Administrative Action for Failure of the Lessee to Comply with a Departmental Regulation.

The Secretary of the Interior has directed the cancellation of the oil and gas lease issued by him to Boesche November 15, 1957, effective December 1, 1957, on the ground that Boesche's application for the lease was in violation of a Departmental regulation. The authority of

the Secretary to cancel the lease is now before this Court. If the Secretary possesses the authority to cancel oil and gas leases, that authority must be found, expressly or by necessary implication, in the Act under which the Secretary is authorized to grant oil and gas leases. The Act of Congress here under consideration is the Mineral Leasing Act of 1920, as amended.[1] A careful reading of the Act will disclose that Section 31[2] contains the only provision pertaining to "cancellation by the Secretary of the Interior"; no other provision of the Act contains similar words, or words of similar meaning and effect. Further, the provision for cancellation by the Secretary is so clear and explicit as to be beyond serious dispute. For this reason the Secretary asserts that the authority to annul and cancel oil and gas leases granted pursuant to the Act may be found in Rev. Stat. 441, 5 U.S.C. 485, enacted by Congress before the turn of the century, and by various statements of this Court to the effect that such statute vests him with that superintending and supervising power which will enable him to do justice.

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1. 30 U.S.C. 181 *et seq.*

2. 30 U.S.C. 188, which provides in part as follows:

"Except as otherwise herein provided, any lease issued under the provisions of this Act may be forfeited and cancelled by an appropriate proceeding in the United States District Court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; * * *

"Any lease issued after August 21, 1935, under the provisions of Section 17 of this Act shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. * * *"

Rev. Stat. 441 provides in pertinent part only that "The Secretary of the Interior is charged with the supervision of public business relating to * * * public lands * * *." That the Secretary does possess broad powers under this statute cannot be denied; but such powers, however broad or inclusive, do not include the power to cancel oil and gas leases granted under the Mineral Leasing Act. Examination of numerous cases dealing with the Secretary's powers discloses three limitations: (1) the authority granted to the Secretary under Rev. Stat. 441 is *administrative* power only;[3] (2) it is *always* exercised in connection with another Act of Congress, which actually furnishes the framework *within which* the authority is to be exercised;[4] (3) the Secretary's authority ceases when the final administrative act[5] essential to the transfer of title has been performed and the legal title[6] to the interest disposed of passes from the United States.

The Secretary, to sustain his asserted authority must, of necessity, take the position that the cases support the view that it is the disposal of the *fee title* rather than of the *legal title* which terminates his authority and jurisdiction over the interest granted under any Act of Con-

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3. *United States* v. *George*, 228 U.S. 14, 20.

4. For example: The Homestead Act in *Johnson* v. *Towsley*, 80 U.S. 72, and *Lee* v. *Johnson*, 116 U.S. 48; the Swamp-Land Act in *Brown* v. *Hitchcock*, 173 U.S. 473; the Placer Mining Act in *Ickes* v. *Virginia-Colorado Dev. Co.*, 295 U.S. 639; the Timber and Stone Act in *Hawley* v. *Diller* 178 U.S. 476; the Donation Act in *Vance* v. *Burbank*, 101 U.S. 514.

5. *United States* v. *Schurz*, 102 U.S. 378; *Michigan Land & Lumber Co.* v. *Rust*, 168 U.S. 589; *Pan American Petroleum Corporation* v. *Pierson*, 284 F.2d 649; *Witbeck* v. *Hardeman*, 51 F.2d 450.

6. *Moore* v. *Robbins*, 96 U.S. 530; *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165; *Kern River Co.* v. *United States*, 257 U.S. 147.

gress; that in reference to this case, the United States leases the mineral estate but does not part with the fee title; that, consequently, his administrative power never ceases but continues to exist. The Secretary's construction is based upon cases involving *equitable*[7] claims on the public domain, rather than cases involving grants of legal title.

Such a construction of Rev. Stat. 441 was unknown to the Sixty-Sixth Congress when the Leasing Act was being considered. The history of the Act unequivocally shows that the power to cancel a lease was not only to be limited, but denied altogether except through judicial proceedings. In discussing the matter Senator Lenroot said:

> "I should like to remind both Senators (Smoot and McKellar) that *the Secretary of the Interior has no right or authority under the bill to ca ! a lease. It can only be canceled by judicial proceedings and a forfeiture* * * *"[8] (Emphasis supplied)

The Congressional Record further shows that Mr. Anderson attempted to insert a provision for cancellation and forfeiture without court proceedings in cases of fraud:

> "*Mr. Anderson*: Mr. Chairman, I move to strike out the last word. I want to ask the Chairman of the Committee a question. The provision beginning on line 6, page 6 provides:

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7. For example: A homestead entry in *Harkness & Wife* v. *Underhill*, 1 Black 316, and in *Orchard* v. *Alexander*, 157 U.S. 372; the correction of an erroneous survey prior to patent in *Knight* v. *United Land Association*, 142 U.S. 161; a timber land entry in *Hawley* v. *Diller*, 178 U.S. 476; a forest reserve land selection in *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316; a lode mining claim in *Cameron* v. *United States*, 252 U.S. 450.

8. 58 Congressional Record, page 4169 (1920).

'any interests held in violation of this act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General' and so forth.

I take it that under that language the holding is valid and any operations conducted under it would be valid until after action brought by the United States. Am I correct in my construction of the language?

Mr. Sinnott: That would relate to a lease, but not to a permit. The secretary has certain rights under a permit, but after the permit is merged into a lease, then it will take court action.

Mr. Anderson: Well, Mr. Chairman, I want to ask what was the reason for that sort of provision? Ordinarily a lease would be void ab initio, but here you put the entire burden on the government to proceed to forfeit the lease before anything can be done in the way of showing fraud.

Mr. Sinnott: It is in recognition of that legal, or equitable principle that the law abhors a forfeiture, and there must be a showing made in court before the forfeiture can be secured."[9]

Mr. Anderson's motion was defeated, and the Act as passed made no provision for cancellation of leases by the Secretary under any circumstances except through court proceedings instituted by the Attorney General. Thus it can be seen that at the time of passage of the Act the framers were purposely limiting the power of the Secretary to the area of determination prior to issuance of the lease.

The Act was amended in 1935 to allow the Secretary to cancel any lease issued after August 21, 1935, *for failure of the lessee to comply with the terms of the lease.* This is the only power that has ever been granted the Secretary to cancel a lease by administrative action.

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9. 58 Congressional Record, page 7604 (1920).

Rev. Stat. 441, 5 U.S.C., Sec. 485, has absolutely no relevance or applicability to the question presented here. Whatever authority the Secretary possesses in matters involving oil and gas leases must be measured exclusively by the Mineral Leasing Act, since that is the act which authorizes the exercise of administrative authority by the Secretary in the area of oil and gas leasing.[10] Without the Mineral Leasing Act the Secretary has no authority with respect to oil and gas leasing.[11] With the enactment of the Mineral Leasing Act went a delegation of administrative power to the Secretary to administer the grant of leases authorized by that Act.[12] Section 1 (30 U.S.C., Sec. 181) of the Mineral Leasing Act, provides for disposition of deposits of oil and gas and lands containing such deposits. Section 37 (30 U.S.C., Sec. 193) provides that such disposition shall be "only in the form and manner provided in this Act." The disposition is to be by means of leases rather than by patents, as formerly.

> "The passage of the leasing act of February 25, 1920, was the enactment into law of a broad and compre-

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10. See 3 Sutherland's Statutory Construction (3d Ed.), Sec. 5822, p. 117, where it is said "* * * The rule of *expressio unius exclusio est alterius* may be used advantageously in some cases in determining whether a statute should be construed as mandatory or permissive. As applied in this connection the rule is that if a statute provides one thing, a negative of all others is implied. Where a statute granted authority to do a thing and prescribed the manner of doing it, *the rule was clearly set out that the provision as to the manner of* doing the thing was mandatory even though the doing of it in the first place was discretionary." Citing *Kansas City, Mo.*, v. *J. I. Case Threshing Machine Co. et al.*, 87 S.W.2d 195, Mo., 1935.

11. *Clyde* v. *Cummings*, 101 Pac. 106, 108, Utah, 1909: "* * * the Secretary of the Interior has no authority under his general power of supervision and control of the public domain to lease any part of it, unless authorized to do so by an act of Congress."

12. See Section 32 of the Act, 30 U.S.C., Sec. 189.

hensive plan of general application by which an entire new system respecting the disposition of lands and deposits of minerals beneath the surface owned by the United States and valuable for certain specified minerals was adopted." *E. M. Harrison*, 49 L.D. 139, 144.

A new system of disposal was adopted but the legal principles established continue to govern. Among these is the principle that the Secretary's jurisdiction over the interest granted terminates when the legal title passes. By the issuance of an oil and gas lease the Secretary has performed the last act required of him to vest in the lessee the legal title[13] to the leasehold estate granted[14] and, upon performance of this last act in disposing of the leasehold estate, administrative power to annul or cancel ends and judicial power begins. *Moore* v. *Robbins*, 96 U.S. 530; *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165; *Kern River Co.* v. *United States*, 257 U.S. 147; *Bell Oil & Gas* v. *Wilbur*, 50 F.2d 1070; *Pan American Petroleum Corporation* v. *Pierson*, 284 F.2d 649.[15] The *Noble*

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13. *Ortiz* v. *Manning*, 82 P.2d 897, 898, Ariz. 1938: "A lease from the government undoubtedly is a legal title."

14. *R. B. Whitaker et al.*, 63 I.D. 124, 125: "In granting the lease * * * the Secretary of the Interior disposed of the entire oil and gas leasehold estate in the land."

15. Accord: *United States* v. *Schurz*, 102 U.S. 378: "From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result at some stage or other of the proceedings their authority in the matter ceases. It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed."; *Michigan Land & Lumber Co.* v. *Rust*, 168 U.S. 589, 593: "In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed." See also *Parcher* v. *Gillen*, 26 L.D.

and *Kern River* cases are particularly significant in that the legal title principle was held fully applicable where the property right granted by the government was only a right of way, a lesser interest than the full fee simple estate.

The courts have recognized that this principle applies to oil and gas leases granted under the Mineral Leasing Act. The U. S. Court of Appeals for the D. C. Circuit, held in *Bell Oil & Gas Co.* v. *Wilbur*, 50 F.2d 1070, that the Secretary was governed by Sec. 31 of the Mineral Leasing Act and had to go to court to secure cancellation of an oil and gas lease, stating:

> "It is unnecessary for us to enter into any discussion as to the action of the Secretary, since we are compelled to dispose of the case on another ground, namely that the plaintiff has an adequate remedy at law. The Secretary, under the terms of the Act, has no power of his own fiat to cancel these leases. He is required to go into a District Court of the United States to accomplish that result by a proceeding in equity."[16]

34, 42: "The true rule drawn from an examination of all the authorities is that the jurisdiction of the land department ceases where the jurisdiction of the courts commence, viz.: when the legal title passes, and that there is no hiatus between the termination of the one and the beginning of the other. Under this rule the land will always be within a jurisdiction which can administer the law and protect both public and private rights."

16. Accord: *Hodgson* v. *Midwest Oil Company*, 297 Fed. 273, affirmed 17 F.2d 71, 269 U.S. 534, recognized that the issuance of an oil and gas lease (being the highest muniment of title permitted under the Mineral Leasing Act) was no different in principle from the award of a patent (being the highest muniment of title permitted under the several Acts of Congress authorizing the issuance of patents), saying, 297 Fed., at page 276: "The analogy seems to be perfect." In *Witbeck* v. *Hardeman*, 51 F.2d 450, affirmed 286 U.S. 444, the court said at page 452: "Under the Leasing Act the land of the United States is not to be

The Department of the Interior has held to the same effect. In *The Melish Consolidated Placer Oil Mining Co.* v. *Testerman*, 53 I.D. 205, the Assistant Secretary said, at page 207:

> "Under the acts under which the award and lease to Testerman and his co-lessees were granted, the department had full power to determine all questions of fact and law essential in properly making such awards and granting leases pursuant thereto. The lease once granted was beyond recall by the Secretary and is only subject to cancellation in the Federal Courts (Sec. 31, Act of February 25, 1920). Jurisdiction of the department to review his action in granting it ceased."

The Court below cites *McKay* v. *Wahlenmaier*, 226 F.2d 35, as authority for the proposition that the Secretary not only has authority to cancel a lease issued on a defective application but may be required to do so. The case does not support such proposition. There, the Secretary had determined that all applications filed before a certain date would be considered simultaneous filings and a drawing would be held to determine the priority of applicants. Among the applicants were Wahlenmaier, Culbertson, Irwin, and Culbertson & Irwin, Inc., a corporation of which Culbertson was President and Irwin was Vice-President. The drawing was held and Culbertson's

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conveyed by patent, but leased, so that the proprietory interest of the United States in the land never ceases. Nevertheless, the lease is the final action of the land department in disposing of the land, and in this respect is analogous to a patent. The general powers of the Land Department in administering this law are just such as are exercised in administering other land laws, and exactly the same necessities exist for judicial review of frauds on or in the department, or mistakes of law, or excesses of the limits of the authority, as arose in reference to the grants of patents, and similar remedies sought to apply."

name was drawn first; Wahlenmaier's name was drawn second. After a lease was issued to Culbertson, Wahlenmaier protested, calling the Secretary's attention to the facts surrounding the Culbertson and Irwin applications. The Secretary found Culbertson had violated the regulations requiring disclosure of his interests as a shareholder in his corporation's federal leases but refused to cancel Culbertson's lease. Wahlenmaier filed suit in which he asked that the Secretary be directed to cancel the lease to Culbertson and issue one to him. The relief was granted and affirmed on appeal. This brief statement is sufficient to show that the issue of administrative cancellation was not raised by either party to the lawsuit. The authority of the Secretary to cancel the lease was assumed by both parties. It was not before the court in any adversary sense inasmuch as Culbertson was not a party to the suit. It was not argued. It was not decided. That case is neither authority nor precedent for anything at issue in this case.

The court below, which also decided the *Wahlenmaier* case, had this to say about it:

> "We think McKay v. Wahlenmaier, 226 F.2d 35, does not decide that administrative cancellation was available to the Secretary in the present case. There we held that the Culbertson lease should be cancelled, and ordered the Secretary to cancel it. We did say also that the Secretary could have cancelled in the situation there presented, but the fact is the cancellation was ordered by the court as the result of a judicial proceeding, and not on review of administrative action."[17]

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17. The Department of the Interior itself, in *Lynn Nelson et al.*, 66 I.D. 14, expressed the same view, stating that in *Wahlenmaier* "The Court ordered cancellation of the lease."

The foregoing is an excerpt from the opinion of October 3, 1957, in *Seaton* v. *The Texas Company* which was later withdrawn following a rehearing and a second opinion reported in 256 F.2d 718. The withdrawal does not invalidate the court's comments on its own case. Further, so far as the *Seaton* case is applicable here, both opinions hold that administrative cancellation of the lease involved was not valid administrative action.

The Secretary asserts that the administration of the Mineral Leasing Act will be jeopardized unless the Secretary can cancel administratively oil and gas leases issued by him under the Act. Numerous "statistics" have been advanced but no facts demonstrating any inability to correct errors have been presented. Furthermore, this case does not involve acquired lands, Indian, Naval Petroleum Reserve or Outer Continental Shelf lands which Appellee has included in his "statistics." Nor does this case involve Taylor Grazing Act permits, transmission line easements and "other myriad of instances". This case only involves a lease granted to Boesche under the authority of the Mineral Leasing Act. The absence of Departmental authority to cancel patents and other grants has not hampered the administration of the other land grant acts even though much more of the public lands have been sold and patented than have been leased for oil and gas purposes.[18]

In the Secretary's Memorandum filed in this Court, urging certiorari in this case, at page 2 thereof, he states

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18. More than one billion acres of the original Public Domain has been included in sales and grants to war veterans, states, railroads, homesteaders and others. About 287 million acres have been included in homestead patents alone. *The Yearbook of Agriculture*, 1958, published by the U. S. Government Printing Office, Washington, D. C., p. 43; *The World Almanac*, 1961, p. 277.

that there were 1,129 administrative cancellations of leases during the three year period ending June 30, 1960. However, most of such so-called cancellations are not cancellations at all in the real sense of such term but amount to mere declarations of termination such as is involved when a lease terminates for failure of lessee to make timely payment of a rental, or where such "cancellation" is made merely to clear the land office records in cases where a lease has been issued on land not owned by the United States or where a lease has been issued inadvertently on lands already under lease. In such cases cancellation is not involved.[19] However, once a lease has been issued the Secretary must comply with the provisions of the Mineral Leasing Act, and cannot cancel the lease by administrative action except as specifically provided in Section 31 of the Act. Moreover, continued and repeated administrative cancellations, alleged to have occurred since 1920, cannot thwart the plain purpose of a valid law.[20] As was pointed out by the court in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 103 F. Supp. 569, affirmed 343 U.S. 579, it is difficult to follow the argument

> "that several prior acts apparently unauthorized by law, but never questioned in the courts, by repetition

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19. See for instance *L. N. Hagood,* A-26226 (October 5, 1951), reported in Gower's Federal Service SO-1951-48, where the Solicitor stated: "The decisions below stated that the appellant's lease should be cancelled. This terminology is technically incorrect, since the word 'cancellation' connotes the annulment or avoidance of something which has been in force. As pointed out above, Mr. Hagood's lease was void from its inception, and was thus incapable of cancellation. Accuracy is better served by a declaration that the Hagood lease is null and void."

20. See *United States* v. *City and County of San Francisco,* 310 U.S. 16, 31-32.

clothe a later unauthorized act with the cloak of legality. Apparently, according to his theory, several repetitive, unchallenged, illegal acts sanctify those committed thereafter. I disagree."

If the Secretary who issues federal oil and gas leases may also cancel the same at his own caprice, the practical operation of the Mineral Leasing Act as well as the stability of leasehold title, so important in promoting the prompt and efficient development of the oil and gas deposits in public lands, is most seriously impaired. As pointed out by the court in *Pan American Petroleum Corporation* v. *Pierson et al.*, 284 F.2d 649, at page 655, the exploration for oil and gas is costly. The drilling of wells requires substantial financial risks, and the expense of putting those wells on production and marketing the product is burdensome. If the continued existence of the granted leasehold estate is dependent upon the fluctuating policies of the Secretary, without any limitations safeguarding the vested interests of the lessee, the value of federal oil and gas leases as a title basis for oil and gas development is greatly diminished if not practically destroyed.

CONCLUSION.

It is clear that the Secretary of the Interior, by purporting to cancel the Boesche lease by administrative action, exceeded the authority granted to him by Congress and violated the provisions of Section 31 of the Mineral Leasing Act.

It is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

SCOTT A. PFOHL,
Rocky Mountain Oil and Gas Association,
Chairman, Legal Committee,
Denver Club Building,
Denver, Colorado,

NORBERT E. PROCTER,
Mid-Continent Oil and Gas Association,
Chairman, Subcommittee on Public Lands Matters of Legal Committee,
101 University Blvd.,
Denver, Colorado,

HOWARD C. BRATTON,
New Mexico Oil and Gas Association,
Chairman, Legal Committee,
Hinkle Building—P. O. Box 10,
Roswell, New Mexico.

Of Counsel:

A. G. MCCLINTOCK,
Attorney at Law,
304 West 20th Street,
Cheyenne, Wyoming.

For The Rocky Mountain Oil and Gas Association:

T. J. FILES, Attorney,
Pan American Petroleum Corporation,
Casper, Wyoming,

JOHN S. MILLER, Attorney,
Amerada Petroleum Corporation,
Tulsa, Oklahoma,

WILLIAM T. SCHWARTZ,
Attorney at Law,
The Consolidated Royalty Oil Company,
Casper, Wyoming,

WALLACE L. CAMPBELL,
Attorney at Law,
Akolt, Turnquist, Shepherd & Dick,
Denver, Colorado,

V. P. CLINE, Attorney,
California Oil Company,
Denver, Colorado,

CLINTON D. VERNON,
Attorney at Law,
Salt Lake City, Utah,

JAMES S. HOLMBERG,
Attorney at Law,
Denver, Colorado,

ELMER J. JACKSON, Attorney,
Kansas-Nebraska Natural Gas Co.,
Hastings, Nebraska,

J. E. HORIGAN—Denver, Colorado,
W. R. HARRISON—Midland, Texas,
Attorneys,
Socony Mobil Oil Company, Inc.,

A. T. SMITH, Attorney,
Continental Oil Company,
Denver, Colorado,

CHARLES LUEDKE,
Attorney at Law,
Billings, Montana,

J. P. GREVE, General Attorney,
Sunray DX Oil Company,
Tulsa, Oklahoma,

JACK C. OSBORNE, Attorney,
Northern Natural Gas Producing Company,
Omaha, Nebraska,

ROBERT D. POULSON, Attorney,
The Superior Oil Company,
Denver, Colorado,

JOHN CRAWFORD, JR., Attorney,
Mountain Fuel Supply Company,
Salt Lake City, Utah,

C. W. MCDERMOTT, Attorney,
Colorado Oil and Gas Corporation,
Denver, Colorado,

WALTER E. WILL, Attorney,
Texaco, Inc.,
Denver, Colorado,

CLAIR M. SENIOR,
Attorney at Law,
Senior & Senior,
Salt Lake City, Utah.

For The New Mexico Oil and Gas Association:

HOWARD C. BRATTON,
Chairman of the Public Lands Committee,
P. O. Box 10,
Roswell, New Mexico,

L. C. WHITE,
Chairman of the Legal Committee,
Bishop Building,
Santa Fe, New Mexico.